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No. 83-1171

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

EXXON CORPORATION, *et al.*,
Petitioners,

v.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *et al.*,
Respondents.

REPLY OF EXXON CORPORATION, ET AL., TO BRIEFS IN OPPOSITION

EDMUNDS TRAVIS, JR.
DOUGLAS W. RASCH *
EXXON CORPORATION
P.O. Box 2180
Houston, Texas 77001
(713) 656-5243
Attorneys for Petitioner Exxon Corporation

* Counsel of Record

[Counsel for Additional Petitioners Continued Inside]

March 2, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

AMINOIL INC.
DAVID M. WHITNEY
2800 North Loop, West
Houston, TX 77092

AMOCO PRODUCTION COMPANY
WILLIAM T. BENHAM
P.O. Box 5910-A
Chicago, IL 60680

CARROLL L. GILLIAM
J. PAUL DOUGLAS
JON L. BRUNENKANT
GROVE, JASKIEWICZ, GILLIAM AND COBERT
Suite 501
1730 M Street, N.W.
Washington, DC 20036

ARCO OIL AND GAS COMPANY, DIVISION OF ATLANTIC RICHFIELD COMPANY
ARTHUR J. WRIGHT
P.O. Box 2819
Dallas, TX 75221

CARROLL L. GILLIAM
J. PAUL DOUGLAS
JON L. BRUNENKANT
GROVE, JASKIEWICZ, GILLIAM AND COBERT
Suite 501
1730 M Street, N.W.
Washington, DC 20036

CHEVRON U.S.A. INC.
JUSTIN R. WOLF
GEORGE H. ROTHSCHILD, JR.
1625 K Street, N.W.
Washington, DC 20006

CONOCO INC.
CAROLYN S. HAZEL
WILLIAM G. ROBB
P.O. Box 2197
Houston, TX 77001

GETTY OIL COMPANY
CLOY D. MONZINGO
MICHAEL P. KOVICH
P.O. Box 1404
Houston, TX 77001

GULF OIL CORPORATION
WALTER L. BRIGNON
ANTHONY V. SORRENTINO
P.O. Box 3725
Houston, TX 77253

MOBIL OIL CORPORATION, MOBIL OIL EXPLORATION AND PRODUCING SOUTHEAST, INC., MOBIL PRODUCING TEXAS AND NEW MEXICO, INC.
ROBERT D. HAWORTH
EDGAR K. PARKS
9 Greenway Plaza
Suite 2700
Houston, TX 77046

CARROLL L. GILLIAM
J. PAUL DOUGLAS
JON L. BRUNENKANT
GROVE, JASKIEWICZ, GILLIAM AND COBERT
Suite 501
1730 M Street, N.W.
Washington, DC 20036

PENNZOIL COMPANY
PATRICIA A. CURRAN
JOHN B. CHAPMAN
P.O. Box 2967
Houston, TX 77001

R. GORDON GOOCH
CHARLES M. DARLING
THOMAS J. EASTMENT
BAKER & BOTTS
1701 Pennsylvania Ave., N.W.
Washington, DC 20006

PHILLIPS PETROLEUM COMPANY
PHILLIPS OIL COMPANY
C. J. ROBERTS
LARRY PAIN
JENNIFER A. CATES
1258 Adams Bldg.
Bartlesville, OK 74004

PLACID OIL COMPANY
RONALD D. HURST
PAUL HICKS
3900 Thanksgiving Tower
1601 Elm
Dallas, TX 75201

SHELL OIL COMPANY
THOMAS G. JOHNSON
ROBERT A. HASTY, JR.
One Shell Plaza
P.O. Box 2463
Houston, TX 77001

SUN EXPLORATION AND PRODUCTION COMPANY
ROBERT B. PERRY
P.O. Box 2880
Dallas, TX 75221

TENNECO OIL COMPANY
JAMES R. SCHMITT
PHYLLIS RAINEY
RICHARD G. HARRIS
P.O. Box 2511
Houston, TX 77001

R. GORDON GOOCH
CHARLES M. DARLING
THOMAS J. EASTMENT
BAKER & BOTTS
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

TEXACO INC.
KAREN A. BERNDT
RALPH J. PEARSON, JR.
MERRILL E. FLIEDERBAUM
P.O. Box 52332
Houston, TX 77052

THE SUPERIOR OIL COMPANY
JAY G. MARTIN
TERESA F. PAULISSEN-STEER
P.O. Box 1521
Houston, TX 77001

UNION OIL COMPANY OF CALIFORNIA
LOIS ELLEN GOLD
P.O. Box 7600
Los Angeles, CA 90051

CARROLL L. GILLIAM
J. PAUL DOUGLAS
JON L. BRUNENKANT
GROVE, JASKIEWICZ, GILLIAM AND COBERT
Suite 501
1730 M Street, N.W.
Washington, DC 20036

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REPLY OF EXXON CORPORATION, ET AL., TO BRIEFS IN OPPOSITION

Petitioners Exxon Corporation, *et al.* ("Producers"), hereby reply to two arguments raised by the Respondents[1] in opposition to the petitions for a writ of certiorari filed by Producers and by the Federal Energy Regulatory Commission ("Commission") (No. 83-1171). These arguments are (i) that neither the Producers nor the Commission argued to the court of appeals that the Commission lawfully exercised its rulemaking authority in promulgating the rule here on review, and (ii) that this Court should not grant certiorari because of alleged

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[1] Respondents are the Interstate Natural Gas Association of America, ANR Pipeline Company (formerly Michigan Wisconsin Pipe Line Company), Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Division of InterNorth, Inc., and Transcontinental Gas Pipe Line Corporation ("Pipelines"); Associated Gas Distributors ("AGD"); and Laclede Gas Company ("Laclede"). The Public Service Commission of the State of New York and the Commonwealth of Kentucky Public Service Commission filed a brief *amicus curiae* in opposition to the petitions for a writ of certiorari.

procedural defects in the proceedings before the Commission. Respondents' other arguments are answered in the petitions.[2]

REASONS

I. THE QUESTION OF THE SCOPE OF THE COMMISSION'S DISCRETIONARY RULEMAKING AUTHORITY WAS FULLY BRIEFED AND ARGUED BEFORE THE COURT OF APPEALS.

Respondents argue that the Commission and the Producers are foreclosed from arguing in the alternative before this Court that the Commission lawfully exercised its discretionary rulemaking authority under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. § 3301, *et seq.* (Supp. V 1981), in promulgating the rule here on review.[3] The Respondents' position is based on the erroneous assertion that the argument regarding the Commission's discretionary rulemaking authority was not raised before the court of appeals.

It is correct that both the Commission and Producers argued before the court of appeals that the Commission's so-called "dry rule" was an interpretive rule required by the NGPA. Nevertheless as the court of appeals itself recognized (App. 19a-21a; see also, App. 9a and 33a), the Commission and Producers also argued alternatively that the rule was a valid and reasonable rule issued by the Commission pursuant to its discretionary rulemaking

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[2] Respodent AGD (Brief at 4) asserts that "the full court [of appeals] sitting *en banc* denied the suggestions" for rehearing *en banc*. Contrary to AGD's assertion, four of the judges of the Court of Appeals (Circuit Judges Wright, Tamm, Bork and Starr) did not participate in the order denying these suggestions. App. 155a.

[3] Brief in Opposition of Named Pipeline Respondents at 9-10 and 21-23; Brief *Amicus Curiae* for the Public Service Commission of the State of New York and the Commonwealth of Kentucky Public Service Commission in Opposition at 7; Brief in Opposition for Respondent Associated Gas Distributors at 7-8.

authority and was issued in conformity with the NGPA and Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* (1976).[4]

The briefs presented to the court of appeals unequivocally confirm that the question of Commission's discretionary authority to promulgate the "dry rule" was fully argued and presented below. Before the court of appeals, Respondents and parties aligned with them squarely addressed the issue. Indeed, contrary to AGD's present assertions (Brief at 7), the brief to the court of appeals of Lone Star Gas Company, the pertinent portions of which were adopted by reference by Respondents AGD and Laclede, stated that, "[a]t a minimum, the method of determining the number of Btu's in a given volume of gas is an issue of administration and word definition that was left to the Commission. *See* NGPA §§ 501(a) and (b), 15 U.S.C. §§ 3411(a) and (b)."[5]

In fact, Respondents' own arguments to the court of appeals with respect to alleged procedural defects would have been without foundation if they had claimed then, as they now assert, that the Commission lacked discre-

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[4] *Interstate Natural Gas Association of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*, Brief Of Producer Intervenors at 26-29 (Appendix A at 1a-3a); *id.*, Brief For Respondent Federal Energy Regulatory Commission at 25-27 (Appendix B at 4a-5a).

[5] *Interstate Natural Gas Association of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*, Brief For Petitioner Lone Star Gas Company at 24 n.31 (Appendix C at 6a n.31); see, *e.g.*, *id.*, Brief Of Petitioners Michigan Wisconsin Pipe Line Company (now ANR Pipeline Company), *et al.*, at 30-36 (Appendix D); *id.*, Brief Of Petitioner Associated Gas Distributors at 4-5 (Appendix E); *id.*, Brief Of Petitioner Laclede Gas Company Joining In And Adopting Brief Of Lone Star Gas Company at 2-3 (Appendix F); *id.*, Reply Brief Of Petitioner Lone Star Gas Company at 3-6 (Appendix G) (adopted by Respondent Laclede (Reply Brief Of Petitioner Laclede Gas Company Joining In And Adopting Reply Brief Of Lone Star Gas Company at 1-2 (Appendix H))).

tion to prescribe the method of Btu measurement. Instead, Respondents argued below that the Commission erred by failing to give adequate notice and opportunity for comment for its rule and by giving the rule retroactive effect. App. 19a-20a. These arguments would have been totally irrelevant if the Commission had had no discretionary authority to issue a rule prescribing the method of Btu measurement in the first place.

II. THE PETITIONS RAISE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH ARE NOT AFFECTED BY THE ALLEGED PROCEDURAL DEFECTS.

The Pipelines (Br. 10, 28-29) and Laclede (Br. 11-12) suggest that the petitions should be denied because of alleged procedural defects in the proceedings before the Commission. The Producers and the Commission refuted these allegations in the court of appeals, showing that the Commission properly followed the NGPA and the Administrative Procedure Act. App. 20a. The court of appeals did not reach these issues, as it found the Commission's rule to be inconsistent with the NGPA. App. 33a; see also, App. 9a.

Respondents' suggestions of procedural defects simply are not relevant to the issues before this Court. Their arguments provide no basis for denying the petitions which raise important questions of federal law which have not been, but should be, settled by this Court. See, Sup. Ct. Rule 17.1(c).

CONCLUSION

For these reasons and those set forth in the petitions, the petitions for a writ of certiorari should be granted.

Respectfully submitted,

EDMUNDS TRAVIS, JR.
DOUGLAS W. RASCH
Counsel of Record
EXXON CORPORATION
P.O. Box 2180
Houston, Texas 77001
(713) 656-5243
Attorneys for Petitioner Exxon Corporation

DAVID M. WHITNEY
Attorney for
Aminoil Inc.

CLOY D. MONZINGO
MICHAEL P. KOVICH
Attorneys for
Getty Oil Company

WILLIAM T. BENHAM
CARROLL L. GILLIAM
J. PAUL DOUGLAS
JON L. BRUNENKANT
Attorneys for
Amoco Production Company

WALTER L. BRIGNON
ANTHONY V. SORRENTINO
Attorneys for
Gulf Oil Corporation

ARTHUR J. WRIGHT
CARROLL L. GILLIAM
J. PAUL DOUGLAS
JON L. BRUNENKANT
Attorneys for
Arco Oil and Gas Company, Division of Atlantic Richfield Company

ROBERT D. HAWORTH
EDGAR K. PARKS
CARROLL L. GILLIAM
J. PAUL DOUGLAS
JON L. BRUNENKANT
Attorneys for
Mobil Oil Corporation, Mobil Oil Exploration and Producing Southeast, Inc., Mobil Producing Texas and New Mexico, Inc.

JUSTIN R. WOLF
GEORGE H. ROTHSCHILD, JR.
Attorneys for
Chevron U.S.A. Inc.

PATRICIA A. CURRAN
JOHN B. CHAPMAN
R. GORDON GOOCH
CHARLES M. DARLING
THOMAS J. EASTMENT
Attorneys for
Pennzoil Company

CAROLYN S. HAZEL
WILLIAM G. ROBB
Attorneys for
Conoco Inc.

C. J. ROBERTS
LARRY PAIN
JENNIFER A. CATES
Attorneys for
Phillips Petroleum Company
Phillips Oil Company

RONALD D. HURST
PAUL HICKS
Attorneys for
Placid Oil Company

THOMAS G. JOHNSON
ROBERT A. HASTY, JR.
Attorneys for
Shell Oil Company

ROBERT B. PERRY
Attorney for
Sun Exploration and Production Company

JAMES R. SCHMITT
PHYLLIS RAINEY
RICHARD G. HARRIS
R. GORDON GOOCH
CHARLES M. DARLING
THOMAS J. EASTMENT
Attorneys for
Tenneco Oil Company

March 2, 1984

KAREN A. BERNDT
Attorney for
Texaco Inc.

JAY G. MARTIN
TERESA F. PAULISSEN-STEER
Attorneys for
The Superior Oil Company

LOIS ELLEN GOLD
CARROLL L. GILLIAM
J. PAUL DOUGLAS
JON L. BRUNENKANT
Attorneys for
Union Oil Company of California

APPENDICES

APPENDIX A

Excerpts from Brief Of Producer Intervenors in *Interstate Natural Gas Association Of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*

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III. Order Nos. 93 and 93-A are Reasonable.

As shown above, the NGPA requires that ceiling prices apply on an as-delivered basis for each MMBtu of gas sold and delivered. Alternatively, to the extent the Court may find that the Commission has discretion in this area, Order Nos. 93 and 93-A represented a reasonable exercise of the Commission's authority to promulgate regulations designed to account for actual heating value of natural gas sold under the NGPA. Indeed, it would have been an abuse of discretion for the Commission to have promulgated a rule that would have understated the Btu content of the gas delivered.

In reviewing agency rules, the Court does "not inquire into the wisdom of the regulations that the Commission promulgates, and [it] inquire[s] into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported". *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972).

In *National Small Shipments Traffic Conference, Inc.* v. *Civil Aeronautics Board*, 199 U.S. App. D.C. 335, 618 F.2d 819 (D.C. Cir. 1980), this Court summarized the standard of review for rulemaking proceedings:

> Our role as a reviewing court is a limited one. We must affirm the challenged regulations unless we find that the [Commission's] decision was "arbitrary and capricious," * * * or in excess of its statutory authority, * * * or adopted without the observance of the procedure required by law * * * . The "ar-

> bitrary and capricious standard of review is highly deferential. * * * It presumes that the agency's action is valid. * * * and we must affirm the [Commission's] regulations if a rational basis for the [Commission's] decision is presented. * * * Of course, this does not mean that our function is merely to rubberstamp the agency's decision. Rather, we must assure ourselves that the decision was "based on a consideration of the relevant factors", * * * and "that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent." 199 U.S. App. D.C. at 342-43, 618 F.2d at 826-27.

Hence, the scope of review is severally circumscribed. So long as the resulting regulation is neither arbitrary nor capricious and is "reasonably related to the purposes of the enabling legislation", it will be sustained. *Morning* v. *Family Publications Service*, 411 U.S. 356 (1973).

On November 9, 1978, the Natural Gas Policy Act of 1978 (NGPA) was signed into law. By passage of the NGPA, Congress mandated a new legislative framework for the regulation of most facets of the natural gas industry, including a series of specific statutory maximum price levels applicable to "first sales" of natural gas. These statutory ceiling prices are stated in cents "per million Btu".

The Commission was directed to administer essentially all of the NGPA and was authorized to perform any and all acts and to prescribe and issue such rules and orders as it found necessary or appropriate to carry out its functions under the NGPA.

Pursuant to its authority, the Commission promulgated Section 270.204 of its regulations. Section 270.204 described a standard method for measuring gas by adjusting the results obtained under saturated conditions to

reflect the heating value of gas at actual delivery conditions, whatever those conditions are for a particular first sale. Because water vapor displaces energy-producing hydrocarbon molecules, heating value per unit of natural gas varies inversely with water vapor content. As a result, there is often a significant disparity between the heating value of gas at the assumed "standard" conditions and its heating value of natural gas actually delivered by the producer.

Because almost all gas sold in this country is not saturated with water vapor, the adjustment to actual delivery conditions avoids understatement of heating value. In addition this properly prices any gas that may in fact be sold on a saturated with water vapor basis. Under the procedures promulgated by the Commission, gas is priced based on its actual condition, "saturated", "dry" or in between, resulting in neither understatement nor overstatement of Btu content.

As demonstrated above and in Part II of the Statement of the Case, Petitioner's challenge to Section 270.204 herein would have the Commission adopt a method which produces a theoretical quantity of Btu's based on the arbitrary assumption that the gas is "saturated" with water vapor, thereby forcing an artificially low measure of Btu content for any gas which is not saturated with water vapor. If gas which in fact is not water saturated is assumed, for purposes of determining Btu content, to be water saturated, the purchaser would receive up to 1.74 percent of the Btu content of the gas stream for free.

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APPENDIX B

Excerpts from Brief For Respondent Federal Energy Regulatory Commission in *Interstate Natural Gas Association Of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*

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The NGPA itself, on November 9, 1978, gave notice of a different pricing scheme when it expressed prices for "delivered" gas in Btu terms rather than in volumetric terms. Four days later (on November 13) the Commission gave notice, in proposed § 270.204, of its intent to issue a rule concerning the measurement of the heat content of gas. (R. 805). The interim rule issued November 29, 1978, reiterated that intent. At very least, therefore, Petitioners were by that time on notice of the "subjects and issues involved" 5 U.S.C. § 553(b)(3).[27] Subsequently, in January 1979 the producers submitted comments suggesting that heat content be measured on an "as-delivered" basis. Numerous comments (including some filed by Petitioners) were submitted and considered by the Commission before the Commission issued its final rule on Btu content some 18 months later.

In these circumstances, it is difficult to comprehend Petitioners' claim that the Commission's notice and comment procedures were inadequate or that they were effectively unable to comment before they knew the old method

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[27] This is particularly true since the Commission stated in its *Final Interim Regulations* that it:

> . . . solicits comments on all aspects of these interim regulations. It should be emphasized that the Commission intends to review the regulations in their entirety and make whatever changes it deems appropriate based on the comments already received, additional written comments, the views expressed in public hearings, and experiences under the regulations during the next 60 days (R. 1762).

of Btu measurement was in jeopardy. There is no requirement that the agency forecast in its notice of rulemaking what it will ultimately conclude in its final rule. It hardly needs saying that it would frustrate the very purpose of the notice and comment procedures if the agency were bound to adopt only the precise terms of its original notice of proposed rule. See *American Federation of Government Employees* v. *Block*, 655 F.2d 1153, 1158 (D.C. Cir. 1981).

There is no merit to Petitioners' further claim (Lone Star Br. 22) that the Commission has a particularly heavy notice burden because it has "depart[ed] from longstanding industry and agency practice." Under the cases Petitioners cite, (*id.* at 27-28), the agency has the burden to fully explain any departure in its final conclusion from its past practice. That was done here. There is no suggestion in those cases that the agency must provide any more notice than the APA requires. *See* generally, *Vermont Yankee Power Corp.* v. *NRDC*, 435 U.S. 519 (1978).

Nor do the other cases Petitioners cite offer any support for their position. *National Tour Brokers Assn.* v. *United States*, 591 F.2d 896 (D.C. Cir. 1978) is not relevant because the problem the Court dealt with in that case—*i.e.*, the agency had not made clear any intent to issue a rule rather than to suggest that Congress enact legislation—is not present here. There is no question here that the Commission had, from the outset in November 1978, commenced a formal rulemaking. Neither is *Rodway* v. *U.S.D.A.*, 514 F.2d 809 (D.C. Cir. 1975) supportive of Petitioners' claim in the circumstances of this case. In *Rodway* the agency had failed to mention at all in its notice the subject of the ultimate regulation (a coupon allotment system). As explained above, the subject matter of 18 C.F.R. § 270.204 —the method of determining Btu content of gas—was made clear at least as early as November 13, 1978 in the Commission's notice of proposed rulemaking.

APPENDIX C

Excerpts from Brief For Petitioner Lone Star Gas Company in *Interstate Natural Gas Association Of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*

C. Notice Was Not Inherent in the Enactment of the NGPA.

The Commission suggests that, even if it had not provided concrete and focused notice that it was considering an as-delivered Btu measurement rule, such notice was not necessary because it was inherent in the fact that the NGPA "created dramatic and comprehensive changes in longstanding approaches to producer pricing." [31]

There are two fatal defects in this suggestion—one legal and the other factual. The legal defect is that the

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[31] Response of the FERC in Opposition to Motion of Petitioner for Limited Stay Pending Review, filed August 14, 1981, at 9; Response of the FERC in Opposition to Motion of Petitioner for Limited Stay Pending Review, filed January 25, 1982, at 14.

The Commission's assertion that the NGPA and its legislative history provided notice for purposes of rulemaking is different from the arguments made by the Producer Intervenors that the NGPA required Btu measurement at as-delivered conditions or by some of the petitioners that the NGPA required measurement at water-vapor-saturated conditions. Lone Star submits that the statute and the legislative history are devoid of any affirmative requirement of as-delivered Btu measurement, and therefore congressional intent to overturn longstanding administrative practice cannot be inferred. *See Bush v. Oceans International*, 621 F.2d 207, 210 (5th Cir. 1980); *Toilet Goods Ass'n v. Finch*, 419 F.2d 21, 27 (2d Cir. 1969). At a minimum, the method of determining the number of Btu's in a given volume of gas is an issue of administration and word definition that was left to the Commission. *See* NGPA §§ 501(a) and (b), 15 U.S.C. §§ 3411(a) and (b). Arguably, Congress intended to go further and incorporate the historical Btu measurement rule into the pricing mandates of the NGPA, at least with respect to those categories of gas priced in accordance with historical "just and reasonable" rates.

Commission cannot rely on the Congress to fulfill its duties under the APA. This Court has explicitly rejected the argument that the legislative history of a statute authorizing a challenged regulation could provide the requisite APA notice. In *Rodway v. USDA*, 514 F.2d 809, 815 (D.C. Cir. 1975), this Court concluded that:

> [e]ven if the legislative history fully supported the Secretary's view of the law, it cannot seriously be asserted that the congressional debates provided more than constructive notice to appellants. Only publication in the *Federal Register* meets the APA requirement of constructive notice.

The factual flaw is that one searches the NGPA and its legislative history in vain for any indication that Congress ever considered Btu measurement methodology, much less that it gave any specific direction to the Commission on the subject. The NGPA's requirement that maximum lawful prices be expressed in terms of dollars per million Btu's certainly did not, by itself, put the industry on notice that the Commission either was changing or was considering changing the method of measuring Btu content: The issue of *whether* gas prices are to be expressed on a Btu content basis is simply different from the time of *how* Btu content is to be measured.

The Commission has implied that an as-delivered Btu measurement rule is necessary to maintain consistency with the NGPA scheme of pricing gas on an energy value basis. Order 93-A (R. 130-31). But the only change Congress made in this regard is that it required the expression of maximum prices in dollars per million Btus. The requirement that maximum prices be adjusted to reflect energy value was part of the NGA scheme. Indeed, the Commission concedes that water-vapor saturated measurement is no more inconsistent with the pricing scheme of the NGPA than it was with the area and national rate pricing scheme under the NGA. *See id.* (R. 150-54). If that is the case, then the indus-

try could hardly have been expected to conclude from the enactment of the NGPA pricing scheme that a change in the Btu measurement rule would naturally follow.

In sum, there was nothing inherent in the change from Mcf to Btu pricing that also suggested a change in the Commission's long-standing rules regarding Btu measurement, and even if there had been such a suggestion, it would not have provided the requisite APA notice.

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APPENDIX D

Excerpts from Brief Of Petitioners Michigan Wisconsin Pipe Line Company (now ANR Pipeline Company), *et al.*, in *Interstate Natural Gas Association Of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*

III. ASSUMING THAT THE COMMISSION HAD DISCRETION TO CHANGE LONG-STANDING POLICY CONCERNING BTU MEASUREMENT, IT HAS ABUSED ITS DISCRETION IN THIS CASE

In Sections I and II, above, it has been shown not only that the NGPA does not *require* the Commission to change from the "saturated" basis of Btu measurement, but also does not *permit* it. This Section III, however, is premised on the *arguendo* assumption that the Commission does have *discretion* to change such method. Even if that were true, the fact is that the Commission's attempt to make that change, in the orders here under review, is still invalid, because the Commission has violated procedural and substantive requirements.

Even if it were assumed that the Commission has the power under the NGPA to alter by rule the historical method employed in the natural gas industry for Btu measurement, the Commission is nevertheless required to observe the procedural requirements of the Administrative Procedure Act, ("APA") 5 U.S.C. § 551, *et seq.*,[17], ruling case law and constitutional due process. Namely, persons affected by Commission proposals are entitled to meaningful notice of the change that is proposed, and a reasonable opportunity to comment thereon, *prior* to enactment of new regulations. In this case, the Commis-

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[17] Section 502(a) of the NGPA makes the procedural requirements of the APA applicable to informal rulemaking by the Commission under the Act. There can be no question that Section 270.204, promulgated by the orders here under review, qualifies as a rule within the meaning of Section 551(4) of the APA.

sion failed totally to provide prior notice of its intent to change the historical method of determining the Btu content of natural gas, and thereby deprived parties of any meaningful opportunity to comment thereon. As such, the regulation promulgated in the Orders here under review is invalid and this Court should vacate such regulation. *See, e.g., Joseph* v. *Civil Service Commission*, 554 F.2d 1140 (D.C. Cir. 1977); *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478 (2d Cir. 1972).

Courts have consistently held that "the opportunity to comment after promulgation [of a regulation] cannot substitute for notice and an opportunity to comment beforehand." *Mobil Oil Corp.* v. *DOE*, 610 F.2d 796, 804 n. 9 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980). In these proceedings, on November 15, 1978, the Commission issued a notice of proposed interim regulations to be promulgated under the NGPA, which included § 270.204. In its Notice, the Commission described the proposed § 270.204 in the following terms:

> Finally, § 270.204 presents the technical information necessary to determine the number of British thermal units (Btu's) per unit volume of natural gas. This is *necessary* because maximum lawful prices for first sales of natural gas are stated in terms of dollars per million Btu's. (43 *Fed. Reg.* 53280 (1978), emphasis added).

On December 1, 1978, the interim regulations were issued, with no change in § 270.204 from the language proposed by the Commission in the notice and with no additional discussion of this section. The plain meaning of § 270.204 of the interim regulations, and the purpose thereof as expressed by the Commission in the above-quoted language, gives absolutely no indication that the Commission intended a radical departure from the historical method of pricing natural gas on an energy basis according to the number of Btu's per unit of volume

measured on a saturated basis. In fact, there *was* no such intent then. Indeed, the Commission itself stated that the "technical information" provided in § 270.204 was *necessary* because pricing under the NGPA was mandated on the basis of "dollars per million Btu's." There was absolutely no indication that computation of the Btu content of gas in accordance with the regulation would be subject to an unexpressed *further adjustment* to abandon the saturated basis, to measure the Btu content of gas.

It was not until Order No. 93 was issued *on July 16, 1980*, that the Commission purported to "clarify" its intent in issuing § 270.204 of the interim regulations, and that was in a single sentence out of 19 pages of text. It was not until Order No. 93-A was issued, *on April 24, 1981*, that the Commission's new purpose was clearly stated, but with a very dubious after-the-fact rationalization of its earlier error:

> The Commissions' intent in issuing the interim Btu rule [§ 270.204] was merely to describe the standard conditions for measuring the Btu content of natural gas. Unlike the Commissions previous policy, this measurement was *not* to be 'used in computing [a] rate adjustment.' R. 141-142.

Thus, in Order No. 93-A, the Commission finally stated, *for the first time*, that the so-called "interim Btu rule" was completely *unnecessary* for purposes of pricing gas under the NGPA, in contrast to its earlier characterization that the "technical information" set forth in the rule was "necessary because maximum lawful prices for first sales of natural gas are stated in terms of dollars per million Btu's". (43 *Fed. Reg.* 53280 (1978)).[18] The

[18] It was not until December 24, 1981 that the Commission amended § 270.204 to finally clearly provide in the rule that "[t]he maximum lawful price prescribed by the NGPA and this part for any first sale of natural gas applies to the Btu's actually delivered in that first sale." R. 325.

latter-day "clarification" by the Commission can only be rationally viewed as a substantive change. However, it would make a farce of the procedures mandated by the APA and of the Due Process Clause if an agency were allowed to effectively impute notice, after-the-fact, by purporting to "clarify" its original intent with a later explanation which is contrary to the very terms included in the initial Orders. In *National Tour Brokers Association* v. *United States*, 591 F.2d 896, 902 (D.C. Cir. 1978), this Court held that the purpose of the procedural requirements of notice and comment is "to see to it that the agency maintains a flexible and open-minded attitude towards its own rules, which might be lost if the agency had already put its credibility on the line in the form of 'final' rules." The loss of objectivity condemned by this Court in *National Tour* is clearly presented in the instant case, where the *first* indication that the Commission was ever considering a change in its long-standing policy regarding measuring Btu content came in the order issuing the *final regulation*. This Court, in *National Tour*, suggested the nature of adequate procedures, as follows:

> The order of procedure must be, *first*, to notice the proposed rule, *then* to receive comments and evidence directed toward this proposed rule, and, *finally*, to promulgate the final rule. *Id.* at 902 (emphasis added).

By no means can a *final* rule be deemed adequate notice, yet in the subject proceedings there was *no* indication, until the final rule was issued, that the saturated basis was to be abandoned for billing purposes or that such a radical change was even under consideration, and even after that, it took well over a year before the regulation was altered to actually state the change.

Moreover, this Court has held that *clear* notice of proposed rules by an agency is a prerequisite to valid promulgation. For example, in *Home Box Office, Inc.* v. *FCC*,

567 F.2d 9, 36 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 829 (1977), this Court held,

> [A]n agency proposing informal rulemaking has an obligation to make its view known to the public *in a concrete and focused form* so as to make criticism or formulation of alternatives possible. (emphasis supplied).

In this case, the Commission not only proposed a rule without any indication of its view that historical Btu measurement practices (used consistently in the industry for decades) were intended to become superfluous under the new statute, but also issued a regulation which, when read in context with established Commission policy and industry practice, gave precisely the opposite indication. Both pipelines and producers—parties with adverse interests in this matter—interpreted the Commission's "intent" in issuing § 270.204 of the Interim Regulations in the *same* fashion, *i.e.*, that the prices per MMBtu of natural gas under the NGPA would apply to the Btu content of the gas stream measured under the standard conditions (saturated basis) set forth in Section 270.204 of the Commissions' Interim Regulations.[19] Indeed, if the Commission's "intent" had been other than what was then universally accepted, there would have been a real question why the "technical information" was issued as a regulation at all.[20]

The fact that the Commission ultimately adopted the position put forward in certain comments submitted by

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[19] See note 8 *supra*.

[20] As matters now stand, the addition of subsection (c) to Section 270.204 of the Regulations on December 24, 1981 renders subsections (a) and (b) surplusage. The Commission has never explained why it was necessary to issue a regulation governing the determination of Btu content at standard conditions when such a determination is totally irrelevant for purposes of applying the NGPA's maximum lawful prices, under the Commission's new found position.

certain producers on § 270.204 of the Interim Regulations is also irrelevant on the question of proper notice. The fact is that *the Commission* never indicated, in its notice or interim regulations that it was considering a change in established Btu measurement policy. Parties that may be affected by proposals *of other parties* cannot properly be charged with notice by virtue of a proposal raised for the first time in another party's comments.[21] In *Wagner Electric Corp.* v. *Volpe*, 466 F.2d 1013, 1020 (3d Cir. 1972), the Court held:

> Section 4(b) of the Administrative Procedure Act requires notice *before* rulemaking, not after. The right of interested persons to petition for the issuance, amendment or repeal of a rule, granted in Section 4(e) of that Act, is neither a substitute for nor an alternative to compliance with the mandatory notice requirements of Section 4(b).

Thus, the fact that some natural gas producers filed comments with respect to § 270.204 of the Interim Regulation, which objected to such regulation on the grounds that the NGPA allegedly required measuring on the basis of Btu's actually delivered, is not a substitute for clear and unambiguous notice from the agency. The Commission indicated an intent to promulgate its "as delivered" regulation in Order No. 93, at the earliest, without notice. The *post hoc* fiction that interested parties were obligated to divine that Commission intent from the interim regulations, which give no hint whatsoever of changing historical measurement practice, is totally ineffectual as an effort to cure the fatal procedural defect in the regulations.

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[21] In this rulemaking proceeding and in most others before the Commission, parties are not required to serve their comments on other parties. Thus, at best, the pipelines here had only constructive notice of these comments, rather than actual notice.

APPENDIX E

Excerpts from Brief Of Petitioner Associated Gas Distributors in *Interstate Natural Gas Association Of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*

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ARGUMENT

I. IT WAS AN ABUSE OF DISCRETION, ARBITRARY AND CAPRICIOUS, AND CONTRARY TO LAW TO MAKE SECTION 270.204, AS LATER INTERPRETED AND AMENDED, EFFECTIVE RETROACTIVELY TO DECEMBER 1, 1978.

In support of this contention, AGD adopts by reference, pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, the Argument sections I and II of the Brief for Lone Star Gas Company.

II. IN PROMULGATING SECTION 270.204 OF ITS REGULATIONS, THE COMMISSION UNLAWFULLY FAILED TO PROVIDE ADEQUATE NOTICE AND OPPORTUNITY TO COMMENT.

In support of this contention, AGD adopts by reference, pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, the Argument sections I and II of the Brief for Lone Star Gas Company.

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APPENDIX F

Excerpts from Brief Of Petitioner Laclede Gas Company Joining In And Adopting Brief Of Lone Star Gas Company in *Interstate Natural Gas Association Of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*

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Petitioner has urged Respondent to implement Order Nos. 93 and 93-A on a prospective basis only, to the end that this nation's gas consumers not be required to provide natural gas producers with the enormous windfall that will result from a retroactive application of those orders back to December 1, 1978.

In support of that position, Laclede joins in and adopts as its own the Brief being filed herein this date by Lone Star Gas Company.[2] Petitioner has carefully reviewed that Brief and, for the reasons set forth therein, urges the Court to vacate the Btu measurement rule promulgated by Order Nos. 93 and 93-A and remand the case to the Respondent with instructions to afford all parties a full and *fair* opportunity to comment on the substance, applicability and implementation of any proposed "Btu measurement rule" Respondent may seek to adopt.

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[2] Including Lone Star's list of parties, pursuant to the Court's Rule 8(e).

APPENDIX G

Excerpts from Reply Brief Of Petitioner Lone Star Gas Company in *Interstate Natural Gas Association Of America* v. *FERC*, Nos. 81-1690, *et al.*

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ARGUMENT

I. THE NGPA LEAVES IT TO THE DISCRETION OF THE COMMISSION TO DETERMINE THE METHOD OF BTU MEASUREMENT.

It is necessary at the outset to distinguish clearly the positions of the parties on the issue of what the NGPA requires with respect to Btu measurement. Both the Commission and the Producers now argue that the NGPA requires the measurement of Btu's on an as-delivered basis. Some of the Petitioners[3] take exactly the opposite position, arguing that the NGPA adopted the Commission's traditional regulatory policy of requiring the measurement of Btu's on a saturated basis.

Lone Star submits that while the legislative history of the statute does provide some support for the position of these other Petitioners, the most logical inference to be drawn from the statute is that Congress did not insist upon any particular method of Btu measurement; rather, it delegated this and similar administrative questions to the sound discretion of the FERC for resolution. Thus, Lone Star does not challenge the Commission's discretionary authority to adopt an as-delivered Btu measurement rule. Rather, Lone Star submits that in exercising this discretion, the Commission failed to comply with the notice and comment requirements of the due process clause and the APA.

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[3] Michigan Wisconsin Pipe Line Company, Natural Gas Pipeline Company of America, Transcontinental Gas Pipe Line Corporation and the Associated Gas Distributors.

The Producers' argument that the NGPA requires Btu measurement on an as-delivered basis is consistent with the position they have taken throughout the rulemaking proceeding and this judicial review. But it is startling that the Commission, or at least the Commission's counsel, is now for the first time advancing this argument, and indeed making it the linchpin of its position, for the Commission itself explicitly rejected this notion, at least in part, in Order 93-A. There it viewed the statute as leaving the "implementation of energy-referenced pricing for these sections [sections 104, 106 (a) and 109] to the Commission." Order No. 93-A, 46 Fed. Reg. 24,537, 24,539 (May 1, 1981) (R.115, 125).

It is also surprising that counsel's argument calls for a severe restriction in the discretionary authority that the Commission is ordinarily quite zealous in protecting. Indeed, the Commission could have avoided an interpretation so severely restricting its authority by interpreting the statute as giving it discretion and then adopting the rule through proper notice and comment procedures. That it did not do so, but instead is belatedly asserting through counsel that it had no discretion under the statute, can be explained only as an effort to manufacture *post hoc* a rationalization for rulemaking procedures that were plainly unlawful.

A. There Is Nothing in Either the Statute or Its Legislative History That Supports, Much Less Compels, the Conclusion That Congress Intended a Particular Method of Btu Measurement to Be Employed.

The starting point for resolving any issue of statutory construction is the language of the statute itself. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 558 (1979). And, as Justice Frankfurter once stated: "One more caution is relevant when one is admonished to listen attentively to

what a statute says. One must also listen attentively to what it does not say." [4]

No one disputes that the NGPA says that ceiling prices for natural gas are to be expressed on the basis of dollars per million Btu's. More important to the present issue, no one claims that the NGPA itself actually says anything about what method should be used to measure the number of Btu's contained in a given volume of natural gas. Further, no one disputes (although both Respondents fail to mention) that section 501 of the NGPA gives the Commission the authority and discretion to deal with matters of administration and definition not otherwise expressly dealt with in the statute.[5] Only one reasonable conclusion can be drawn from a statute that says nothing at all about the method to be used in determining the Btu content of gas but leaves issues of administration and definition to the discretion of the Commission: Congress intended to delegate the resolution of such technical issues to the sound discretion of the agency possessing the expertise to deal with them.

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[4] Frankfurter, *Some Reflections on the Reading of Statutes*, in 3 SUTHERLAND STATUTORY CONSTRUCTION 409, 419 (1974).

[5] Section 501 of the NGPA provides in relevant part:

SEC. 501. GENERAL RULEMAKING AUTHORITY.

(a) IN GENERAL.—Except where expressly provided otherwise, the Commission shall administer this Act. The Commission . . . is authorized to perform any and all acts (including any appropriate enforcement activity), and to prescribe, issue, amend, and rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this Act.

(b) AUTHORITY TO DEFINE TERMS.—Except where otherwise expressly provided, the Commission is authorized to define, by rule, accounting, technical, and trade terms used in this Act. Any such definition shall be consistent with the definitions set forth in this Act.

See 15 U.S.C. § 3411. The Act itself defines a "Btu" only as "British thermal unit." NGPA § 2(30), 15 U.S.C. § 3301(30).

Neither the Commission nor the Producers are able to point to anything in the language of the NGPA itself to support their argument that the statute requires measurement on an as-delivered basis. Instead, they are reduced to arguing that by adopting Btu's as the unit in which ceiling prices would be expressed, Congress intended to make it "plain," "unequivocal" or even "explicit" [6] that those Btu's were to be ascertained on an as-delivered basis because that, they claim, results in a more accurate measurement of actual Btu content. And accurate measurement, they assert, is necessary to meet the congressional objective of making natural gas prices comparable to those of competitive fuels.[7]

This argument is faulty for a number of reasons, as we shall point out below.

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[6] Producers Brief at 13-14; *see* Commission Brief at 19-22.

[7] *See. e.g.*, Commission Brief at 20-21; Producers Brief at 5-6, 21-22.

APPENDIX H

Excerpts from Reply Brief Of Petitioner Laclede Gas Company Joining In And Adopting Reply Brief Of Lone Star Gas Company in *Interstate Natural Gas Association Of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*

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Petitioner, Laclede Gas Company (Laclede), has urged the Respondent, the Federal Energy Regulatory Commission (Commission), to implement Order Nos. 93 and 93-A, here under review, on a prospective basis only. To this end, Laclede joined in and adopted as its own the Brief filed in this consolidated proceeding on March 19, 1982, by Lone Star Gas Company (Lone Star).

Laclede has reviewed the Reply Brief which is being filed herein by Lone Star. It concurs therein and adopts as its own the arguments supporting the Conclusion that the Court should (1) declare Order Nos. 93 and 93-A to be invalid for reason of their denial of due process and because they reflect the Commission's failure to comply with the provisions of the Administrative Procedure Act and the Natural Gas Policy Act of 1978; (2) direct the Commission to vacate its Regulation 18 C.F.R. § 270.204 which purports to implement those orders; and (3) remand the proceeding to the Commission with directions to initiate a lawful, rulemaking proceeding on the subject.

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